IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 158

WILLARD CARNLEY,

Petitioner,

v.

H. G. COCHRAN, JR., DIRECTOR OF THE DIVISION OF CORRECTIONS, FLORIDA,

Respondent.

BRIEF FOR THE PETITIONER

HAROLD A. WARD, III
WINDERWEEDLE, HAINES, HUNTER & WARD,
224 Park Avenue, So.
Winter Park, Florida
Attorney for Petitioner.

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Opinions Below

The opinion of the Florida Supreme Court (R. 73) is reported at 123 So. 2d 249 (Fla., 1960).

Jurisdiction

The judgment of the Florida Supreme Court was entered September 23, 1960. The "motion for leave to file a petition for writ of habeas corpus" and motion for leave to proceed *in forma pauperis* were filed December 22, 1960 (R. Front Cover) and certiorari was granted June 19, 1961 (R. 77). The jurisdiction of this Court rests upon 28 U.S.C. 1257 (3).

Constitutional Provisions and Statutes Involved

United States Constitution,
Amendment XIV, Section 1

See Appendix

Section 801.02, Florida Statutes, 1959 See Appendix
Section 801.03 (1) (a) Florida Statutes, 1959 See Appendix
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Question Presented

Petitioner filed a petition for a writ of habeas corpus in the Court below. His petition alleged and the record reveals without contradiction that he was convicted and sentenced for serious criminal offenses without the aid of counsel, even though he was illiterate. The question presented is whether these allegations alone, or in any event when considered together with his other allegations, were sufficient to support a claim that he was deprived of his liberty in contravention of the guaranties of the Fourteenth Amendment to the United States Constitution.

Statement of the Case

Petitioner was convicted on September 19, 1958 in the Court of Record in and for Escambia County, Florida, on two counts, the first charging "incest" and the second charging "fondling" (R. 6). His sentence was imprisonment for a term of six months to twenty years (R. 7). Petitioner's wife, Pearl Carnley, was convicted in the same proceedings on two counts of being an accessory before the fact to

"incest" and "fondling", and she received a like sentence (R. 7).

Petitioner commenced this action by filing a petition for a writ of habeas corpus in the Supreme Court of Florida (R. 1). His wife joined in the petition, but she is not a party to the proceedings before this Court (R. 77).

The petition for a writ of habeas corpus alleged that petitioner and his wife were arrested November 5, 1957, held until September 8, 1958, when they waived jury trial on the charges against them, but were nonetheless tried and convicted by a jury on September 19, 1958 (R. 1). It also alleged that petitioner "is completely without education and cannot recount the ABC's", and petitioner and his wife claimed: "Neither possesses the most elementary rudiments of criminal procedure or foreknowledge with which to conduct a defense" (R. 1). Among the other allegations contained in the petition was the following:

> "Petitioners requested defense counsel and protested their innocence and inability to conduct a defense, which same inability was outstandingly manifest at the farce of a trial when both petitioners tried to question the prosecutrix as to who conceived the idea of the criminal prosecution against them, whereupon the Court peremptorily ordered their victims to sit down".

It was also charged that petitioner was not advised of his right to arraignment without unnecessary delay, that he had no knowledge of any warrant or capias, nor was he presented with any nor was such a paper served or read to him at any time, that petitioner was held in solitary confinement for a period of five months prior to trial, that lie detector tests and blood tests to determine the parentage of a child allegedly born of the incestuous relationship were requested but refused, and that the prosecution waited until

after the birth of the child to fix the date upon which the alleged crime occurred.

On June 16, 1960 the Supreme Court of Florida issued a writ of habeas corpus directed to the respondent, the Director of the Division of Corrections (R. 11). Respondent filed a return to the writ of habeas corpus, stating that he held petitioner pursuant to a commitment predicated on a judgment and sentence entered by the Court of record in and for Escambia County, Florida, on September 19, 1958 (R. 12). The return admitted that petitioner was originally arrested on November 5, 1957, and held in Escambia County jail until his trial on September 19, 1958 (R. 13). The return also admitted that petitioner waived jury trial, but alleged that the trial court was not required to dispense with a jury, and that the evidence was submitted to a jury in this case (R. 14). The return denied that petitioner and his wife were totally unable to defend themselves in the trial, that they requested defense counsel, that the trial court peremptorily ordered petitioner to sit down when he and his wife attempted to interrogate the witness against them, and that petitioner requested a lie detector test and blood tests (R. 14). It was affirmatively alleged by respondent that petitioner and his wife actively participated in the conduct of the trial, with both interrogating witnesses against them, making opening statements and making closing arguments (R. 14 and 15). It was also alleged that petitioner was carefully instructed by the trial court with regard to the rights guaranteed by both the Constitutions of the State of Florida and of the United States (R. 15). The sentence imposed upon petitioner was defended on the ground that Section 801.03, Florida Statutes, authorizes a sentence not to exceed twenty-five years in the State Prison for any offense within the meaning of Chapter 801 (R. 15 and 16). A certified copy of a transcript of the testimony

taken at the trial was attached to respondent's return. All allegations not expressly admitted were denied (R. 16).

Petitioner thereafter filed a "Return to Respondent's Reply Brief" (R. 70) alleging that the trial record furnished by respondent clearly reflected that he and his wife were plunged into the middle of their trial without any chance of preparing a defense and without counsel, and noting that the record is silent as to petitioner's claim that he requested defense counsel and protested his inability to defend himself. It was further alleged that the record showed that two proficient prosecutors were arrayed against "these indigent and uneducated defendants" (R. 70).

The Florida Supreme Court in an opinion filed September 23, 1960, discharged the writ previously issued, and remanded petitioner to the custody of respondent. There is no showing that any opportunity was afforded petitioner to prove the allegations of his petition, the case being considered solely on the basis of the petition, return to respondent's reply brief, and the certified transcript of testimony attached to respondent's return. With respect to petitioner's argument that he was denied counsel contrary to the Equal Protection and Due Process clauses of the Fourteenth Amendment of the United States Constitution, the Florida Supreme Court said:

> "The law of this state does not require the court to appoint counsel to represent indigent defendants except in cases where they are charged with a capital offense. Section 909.21, Florida Statutes. If the record shows that defendant did not have counsel or fails to show whether he did or did not have counsel, it will be presumed that defendant waived the benefit of counsel and elected to present his own defense, as he has the right to do under Section 11, Declaration of Rights, Florida Constitution" (R. 75).

With respect to petitioner's allegation that he and his wife were illiterate and unable to defend themselves adequately, the Florida Supreme Court said:

> "The evidence and the record before us show conclusively that petitioners were illiterate but illiteracy does not always mean that the illiterate lacked intelligence about many of the commonplace things of life. I have known men who have had to sign their name by cross mark but those same men could go to the bank and push that cross mark through the cashier's window and get all the money on it they asked for without any other endorsement. The banker knew they were intelligent men of good moral character, respected their obligation, and would meet it. There is no showing here that petitioners suffered in the slightest from lack of intelligence" (R. 75 and 76).

Petitioner thereafter filed a motion for leave to file a petition for writ of habeas corpus in this court, and by order dated June 19, 1961, this court denied the motion. Treating the papers submitted as a petition for certiorari, this court granted certiorari and granted petitioner's motion for leave to proceed *in forma pauperis* (R. 77).

Summary of Argument

Petitioner's allegations in support of his application for a writ of habeas corpus, respondent's return, and the opinion of the court below render it clear that petitioner, though illiterate, was convicted and sentenced after a trial before a jury without assistance of counsel. Under the controlling precedents of this court these facts alone are sufficient to establish that his conviction must fall for failure of the proceedings against him to comply with the Constitutional

guarantee of Due Process of Law. This court has consistently recognized the difficulties facing an uneducated layman in defending himself against criminal charges, particularly when protesting innocence and confronted with the necessity for a full scale trial. An illiterate layman is not better equipped to defend himself.

Even if these circumstances alone be deemed insufficient, it is clear that when coupled with the prejudicial nature of the charges involved, the obvious ignorance and inability of petitioner to defend himself apparent from the transcript of testimony at his trial, and the complex legal questions potentially or implicitly involved, a sufficient claim was stated at least to require the court below to allow petitioner an opportunity to prove his allegations. With respect to the necessity for a hearing, however, petitioner believes that a sufficient factual basis is established by the record to provide grounds for his immediate discharge.

Petitioner also contends that in view of the now unqualified right to assistance of counsel provided for a defendant who can himself furnish such counsel, denial of such an unqualified right to a defendant who is too poor to furnish his own counsel constitutes a denial of due process of law and equal protection of the laws which can no longer be countenanced by this court. This question is squarely presented here in view of petitioner's allegations of his request for counsel and his indigence.

Since the circumstances of petitioner's conviction cannot be reconciled with the guarantees of the Fourteenth Amendment, the judgment of the Court below must be reversed.

ARGUMENT

I.

This Court Has Clearly Established That a State May Not, Consistent With the Fourteenth Amendment, Tolerate Criminal Procedures Which Result in the Denial in Any Particular Case of "Fundamental Fairness" to an Accused.

The basis for petitioner's claim that he is entitled to discharge from the custody of respondent lies in the Fourteenth Amendment to the United States Constitution. It is now established beyond question under the decisions of this court that a state may not, in the establishment of its law governing criminal prosecutions, tolerate procedures which in an individual case result in "a denial of fundamental fairness, shocking to the universal sense of justice". *Betts* v. *Brady*, 316 U.S. 455.

In the years since *Betts* v. *Brady*, this court has granted certiorari and considered a large number of cases from the state courts where allegations of fundamental unfairness arising primarily from the absence of counsel to represent the accused were involved. See for example, *Williams* v. *Kaiser*, 323 U.S. 471, *Tomkins* v. *Missouri*, 323 U.S. 485, *Rice* v. *Olson*, 324 U.S. 786, *Demeerleer* v. *Michigan*, 329 U.S. 663, *Bute* v. *Illinois*, 333 U.S. 640, *Wade* v. *Mayo*, 334 U.S. 672, *Townsend* v. *Burke*, 334 U.S. 736, *Uveges* v. *Pennsylvania*, 335 U.S. 437, *Gibbs* v. *Burke*, 337 U.S. 773, *Herman* v. *Claudy*, 350 U.S. 116, *Cash* v. *Culver*, 358 U.S. 633, *Hudson* v. *North Carolina*, 363 U.S. 697, *McNeal* v. *Culver*, 365 U.S. 109, *Reynolds* v. *Cochran*, 365 U.S. 525, *Palmer* v. *Ashe*, 342 U.S. 134. These cases make it clear that lack of counsel under particular circumstances may result in the denial to an accused of a fair opportunity to defend himself. And where the circumstances indicate that an ac-

cused may be seriously handicapped in presenting his own defense, these cases make it clear that it is incumbent upon the State to provide him with counsel to assist in his defense.*

Petitioner submits, in the light of the cases cited above that the uncontroverted allegations of his petition for a writ of habeas corpus clearly reveal circumstances which render his trial and conviction violative of the Federal Constitution, and that in any event, the uncontroverted allegations together with his additional allegations which he was never given an opportunity to prove in the Court below clearly bring his case squarely within the controlling precedents of this court in which the totality of the circumstances surrounding the trials involved were held to result in a denial of the Due Process guaranteed by the Fourteenth Amendment.

II.

The Circumstances of Petitioner's Conviction Render It Contrary to the Fourteenth Amendment Guarantee of Due Process of Law.

A. Denial of Counsel to an Illiterate Defendant Such as Petitioner Deprives Such a Defendant of a Fair Opportunity to Defend Himself Successfully Against Serious Criminal Charges.

A brief examination of relevant portions of the record, including the transcript of testimony at petitioner's trial, establishes without question that in fact petitioner was not represented by counsel at his trial, and that in fact peti-

* Although as noted in *Herman* v. *Claudy*, 350 U.S. 116, and *Uveges* v. *Pennsylvania*, 335 U.S. 437, some members of this court adhere to the proposition that under the Sixth and Fourteenth Amendments counsel is required in every criminal case, a majority of this court has never adopted that view.

tioner is illiterate. The Florida Supreme Court disposes of the lack of counsel by reciting that counsel is not required in other than capital cases. In so holding it makes no reference whatsoever to the numerous decisions of this court which clearly establish that in a non-capital case the circumstances may be such that a fair trial cannot be conducted without the aid of counsel. The Florida Supreme Court disposes of the uncontroverted fact of petitioner's illiteracy with a conclusion that even the illiterate may be intelligent "about many of the commonplace things of life". It is respectfully submitted, however, that a criminal trial involving a felony charge with possible consequences involving imprisonment of the defendant for twenty years is hardly one of the "commonplace things of life" which any illiterate should be clearly capable of handling on his own behalf without assistance.

The oft quoted language of Mr. Justice Sutherland in *Powell* v. *Alabama*, 287 U.S. 45, seems particularly relevant to this case. He said:

> "Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his

innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect." (287 U.S. 45, 69.)

This court has on numerous occasions considered situations in which it was apparent that the defendant faced with criminal prosecution was, by reason of mental incapacity, extreme youth, or the manner in which the proceedings against him were conducted, unable adequately to defend himself. In *Powell* v. *Alabama*, *supra*, the defendants were illiterate. As noted by Mr. Justice Reed in his opinion in *Uveges* v. *Pennsylvania*, 335 U.S. 437, the age and education of the accused are among the various circumstances which may indicate that counsel is essential to a fair hearing. The education of the defendant was considered in *Demeerleer* v. *Michigan*, 329 U.S. 663, in *Wade* v. *Mayo*, 334 U.S. 672, and in *Cash* v. *Culver*, 358 U.S. 633. In *Moore* v. *Michigan*, 355 U.S. 155, the defendant was a seventeen year old negro with a seventh grade education; in *Massey* v. *Moore*, 348 U.S. 105, it appeared that the defendant's mental capacity at the time of trial might have been such that he was unable to defend himself.

There can be no question, in view of these cases, that the mentality of the defendant is a factor to be considered, as is the extent of his education, in determining whether a fair trial could result in the absence of aid from counsel. In the present case there is no dispute as to petiitoner's illiteracy, and the argument advanced in the opinion of the Florida Supreme Court that some illiterate persons may accumulate such funds and have such standing that a bank will honor their cross mark without question, has little relevance to the ability of such an individual to defend himself in a serious criminal trial.

B. Denial of Counsel Is Particularly Harmful Where the Accused Pleads Not Guilty and a Trial Is Held, and This Court Has Consistently Held With the Possible Exception of *Betts* v. *Brady*, 316 U.S. 455, in Cases Involving Such Factual Circumstances, That Appointment of Counsel Is Essential.

In a majority of the cases considered by this court involving the problem of lack of counsel in a State criminal prosecution, it appears that the defendant in each instance had pleaded guilty to the charges against him. *Smith* v. *O'Grady*, 312 U.S. 329, *Williams* v. *Kaiser*, 323 U.S. 471, *Tomkins* v. *Missouri*, 323 U.S. 485, *Rice* v. *Olson*, 324 U.S. 786, *Canizio* v. *New York*, 327 U.S. 82, *Demeerleer* v. *Michigan*, 329 U.S. 663, *Foster* v. *Illinois*, 332 U.S. 134, *Gayes* v. *New York*, 332 U.S. 145, *Marino* v. *Ragen*, 332 U.S. 561, *Bute* v. *Illinois*, 333 U.S. 640, *Townsend* v. *Burke*, 334 U.S. 736, *Uveges* v. *Pennsylvania*, 335 U.S. 437, *Quicksall* v. *Michigan*, 339 U.S. 660, *Palmer* v. *Ashe*, 342 U.S. 134, *Herman* v. *Claudy*, 350 U.S. 116, *Moore* v. *Michigan*, 355 U.S. 155. In a minority of the cases the defendant has entered no guilty plea, and has been faced with the necessity for conducting his own defense at the trial itself. *Betts* v. *Brady*, 316 U.S. 455,* *Wade* v. *Mayo*, 334 U.S. 672, *Gibbs* v. *Burke*, 337 U.S. 773, *Massey* v. *Moore*, 348 U.S. 105, *Hudson* v. *North Carolina*, 363 U.S. 697, *McNeal* v. *Culver*, 365 U.S. 109, *Cash* v. *Culver*, 358 U.S. 633. In each of these cases, with the sole exception of *Betts* v. *Brady*, *supra*, this court found factual allegations which constituted a denial of Fourteenth Amendment guarantees.**

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* In *Betts* v. *Brady*, it appears that the defendant conducted his own defense in a trial before a judge without jury.

** In *Gryger* v. *Burke*, 334 U.S. 728, the petitioner had been sentenced as an habitual criminal after admitting eight prior convictions. It is not clear from the opinion of the court whether any "trial" took place, but it appears in any event that the petitioner in effect pleaded guilty by admitting the previous convictions.

In *Gibbs* v. *Burke*, *supra*, Mr. Justice Reed specifically noted:

> "A defendant who pleads not guilty and elects to go to trial is usually more in need of the assistance of a lawyer than is one who pleads guilty." 337 U.S. 773, 781.

In the *Gibbs* case, notwithstanding the age of the defendant (thirty-four years) and evidence that some courtroom experience might have been gained by the defendant by virtue of prior convictions, this court held that the circumstances of the trial amounted to a denial of due process. Specifically noted were the admission of inadmissible hearsay and incompetent evidence as well as errors at the trial with respect to making the prosecuting witness petitioner's witness, denying petitioner the right to show that the prosecuting witness had previously made a baseless criminal charge against him, and references by the trial judge to petitioner's prior convictions in the presence of the jury. It seems clear that in the trial of any criminal cause numerous questions of evidence and procedure are likely to arise and to some extent will inevitably arise. To hold that a layman, regardless of his education, is adequately equipped to deal with these questions, is to ignore reality. It is respectfully suggested that this court could properly rule, consistent with all of its previous decisions, with the possible sole exception of *Betts* v. *Brady*, *supra*, that in any criminal trial where there is a plea of not guilty and a trial is necessary, due process requires that the lay defendant be provided with counsel unless he intelligently and competently waives such assistance. Narrowing of the rule to encompass only jury trials, and not trials where a jury is properly waived, would be consistent not only with *all* of the previous decisions of this Court excluding *Betts* v. *Brady*, but would also be consistent with the *Betts* holding.

C. In Any Event, the Ignorance of Petitioner and His Inability to Present any Defense on His Own Behalf Are Apparent From the Record.

Even though it be not agreed that in *every* criminal case the complexities of a trial require the assistance of counsel for a lay defendant unable to provide his own counsel, it must necessarily be agreed that in the case of this illiterate defendant, such assistance was essential. The ignorance of defendant with respect to the issues involved in properly presenting a defense to the charges against him is apparent from the transcript of testimony at the trial. The only participation of the defendant and his wife revealed by the transcript other than their cross-examination by the prosecution, is shown at the following pages of the record: 31 and 32, 41, 47-49, 52-54, 57-59. A typical illustration of the ability of the defendant and his wife in conducting their defense is revealed by page 41 of the record. At the conclusion of the testimony on direct examination of the prosecuting witness, petitioner's daughter, the following occurred:

> "The Court: Mr. Carnley, did you wish to cross examine the witness? Do you wish to interrogate the witness concerning what she has testified to?
>
> Mr. Willard Carnley: Yes, sir.

Cross Examination by Mr. Willard Carnley:

Q. Carol Jean, you say your mother, she went and made arrangements to get the casket for your sister?

A. Yes.

Q. You are right sure now that she did?

A. I am sure.

Q. Well, I will tell the Court, my wife was out at Mr. Joe Gayfer's house—

The Court: Wait a minute, sir, you are testifying. (fol. 45) You will have a chance to testify when the State rests. Any questions you wish to ask your daughter, you are welcome to do it.

Cross Examination by Mrs. Pearl Carnley:

Q. Carol Jean, don't you recall after you got age of maturity that Mother tried to tell you right from wrong and always teach you right from wrong?

A. Yes, you have taught me right from wrong.

Thereupon the witness was excused."

This constituted the entire cross-examination of the prosecution's major witness against the defendant. The only other witness called by the prosecution was petitioner's son. Page 47 of the record reveals that the petitioner asked no questions in cross-examination of this witness.

After being advised of his right to testify or not to testify at the conclusion of the State's case, the following occurred:

"The Court: Mr. Carnley, would you like to take the witness stand?

Mr. Carnley: I would love to say one more thing.

The Court: Wait a minute, sir. Do you wish to take the witness stand and testify?

Mr. Carnley: Yes, sir.

(fol. 56) Willard Carnley, a witness in his own behalf, who after being first duly sworn testified as follows:

The Court: Face the Jury, sir, and testify. You are free to testify now, Mr. Carnley.

Mr. Carnley: Well, what I had now, the children, they was talking about that I didn't come to see them.

I come to see them as many times as I could while they was out there. I went out there, and Glenn, he was sick and was crying, and I was hurt over them taking my children and I got mad there at that woman and kind of popped off a little bit, so she called Judge Bruno, and Judge Bruno told her to not let me come out there to see the children no more. Well, then I taken and told my wife I couldn't live in a country where I couldn't see my children. I went to work at a milk dairy and every other week I would give ten dollars to a fellow to bring my wife over here to see the young ones. She could see them, but they wouldn't let me see them. Well, I was only making twenty-five dollars a week. Of course, we was getting all our milk. I would just take milk from the milk dairy and everything, and this here about the girl, I ain't never handled my daughter in no disorderly respect, and they played hookey a lots from school. When they was going to school, we would send them and they wouldn't go. They didn't have to ride the bus with the other young ones because they went to one school and they went to the other and they played hookey. We sent them to school and we thought they had went and they hadn't. And (fol. 57) during the time that my wife says she seen her last period, well, there was a family of folks lived down the road from there. His wife was sick and they had a little baby, too, and my wife let the daughter go down there every morning early and cook for them and wait on them for about two weeks or maybe approximately a little longer. When she come back home, she would grab a magazine or something or other and read until about dark and she was getting ready then to go and watch television, that's all that she did, television, and we let her go. Sometimes she would go one way and sometimes she would

go the other way to watch television and sometimes she would come back at nine o'clock or eleven or eleven-thirty, and I told my wife I believed we were letting her go a little too much, and she said, 'No, they are getting old enough to have a little bit of privilege,' and so I didn't think nothing else about it, and as far as me knowing anything about it, I didn't know until my wife come back and told me about it. We was working, trying to get straightened out, trying to get a lawyer to get my children back, and that is all I have to say."

The foregoing is set forth at length only because it vividly illustrates the patent inability of petitioner to conduct any defense on his own behalf. Whether *with* the aid of counsel petitioner would have been able to present a successful defense can of course not now be determined with certainty; there can be no doubt, however, that *without* the aid of counsel this defendant was totally incapable of handling his defense, and that the jury verdict of guilty was a foregone conclusion.

D. The Character of the Charges Against Petitioner Emphasize the Necessity of Furnishing Him With Counsel.

The nature of the charges against petitioner are also significant in any consideration of the totality of circumstances surrounding his trial. It is obvious that these charges were more than serious; they were of the type which most citizens would consider particularly repulsive, and which could be readily expected to disgust and revolt the ordinary juror. Under such circumstances it is particularly important that the rights of the accused be zealously guarded. The Florida Supreme Court itself has recognized in considering an incest prosecution involving

the uncorroborated testimony of the prosecuting witness, that it is imperative in such cases that the accused be accorded every right designed by law to protect the liberties with which the citizen is clothed. *Knight* v. *State*, 97 So. 2d 115 (Fla., 1957).

E. Complex Legal Questions Were Potentially or Implicitly Involved in Petitioner's Trial Which Required the Assistance of Counsel.

Although petitioner believes it is clear that the circumstances discussed thus far without more, are sufficient to show clearly a denial to him of the guarantees of the Fourteenth Amendment, it should also be noted that had counsel been appointed, there were present in this case, as in *McNeal* v. *Culver*, 365 U.S. 109, *Reynolds* v. *Cochran*, 365 U.S. 525, and *Gibbs* v. *Burke*, 337 U.S. 773, a number of complex legal questions.

Respondent's return to the petition for habeas corpus filed in the Florida Supreme Court alleged that the sentence imposed upon petitioner was within the maximum prescribed by law inasmuch as Section 801.02, Florida Statutes, provides that the crimes of "incest" and "fondling" (lewd and lascivious behavior) when committed with a person fourteen years of age or under shall be included under the provisions of Chapter 801 of the Florida Statutes, and Section 801.03(1)(a) provides that anyone convicted of an offense within the meaning of Chapter 801 may, in the discretion of the trial judge, be sentenced to a term not to exceed twenty-five years in the state prison (R. 15 and 16). The Florida Supreme Court opinion contains a similar statement (R. 74). It thus clearly appears that respondent and the Court below viewed petitioner's alleged crimes as falling within the provisions of Chapter 801 of the Florida Statutes. That Chapter, known as the Florida

Child Molester Law, has a number of other provisions which counsel for petitioner, had there been such at his trial, might have invoked. For example, Section 801.10 provides in relevant part:

> "When any person is charged with an offense within the purview of this chapter, said person may petition the court for a psychiatric and psychological examination as heretofore set out and the written report shall be filed with the clerk of the court having jurisdiction of the offense for the purpose of assisting the court in the trial of the case . . . ."

Section 801.03 (1) (b) specifically authorizes the trial judge, when any person has been convicted of an offense under Chapter 801, to:

> "Commit such person for treatment and rehabilitation to the Florida state hospital, or to the hospital or the state institution to which he would be sent as provided by law because of his age or color provided the hospital or institution possesses a maximum security facility as prescribed by the board of commissioners of state institutions. When, as provided for in this law, there shall have been created and established a Florida research and treatment center, then the trial judge shall, instead of committing a person to the Florida state hospital, commit such person instead to the Florida research and treatment center. In any such case the Court may, in its discretion, stay further criminal proceedings or defer the imposition of sentence pending the discharge of such person from further treatment in accordance with the procedure as outlined in this chapter".

Section 801.08 gives the trial judge under whose jurisdiction a conviction is obtained pursuant to the Chapter authority to suspend the execution of judgment and place the defendant upon probation. In short, had counsel been appointed to represent the petitioner, it is possible that some of the opportunities provided under Chapter 801, obviously designed for rehabilitation of persons charged with offenses thereunder, might have provided assistance for petitioner.

If in fact, as suggested by respondent in his return and by the opinion of the court below, petitioner was convicted on both counts and sentenced pursuant to Chapter 801, it is also possible that counsel for petitioner might have challenged the constitutionality of this act on grounds similar to those which were successfully invoked by the State in *Copeland* v. *State*, 76 So. 2d 137 (Fla., 1954). In that case the defendant was convicted of rape in the trial court and sentenced to death pursuant to Section 794.01 of the Florida Statutes. On appeal the defendant challenged the validity of his conviction and the jurisdiction of the court where he was tried on the ground that Chapter 801, the Florida Child Molester Law, specifically included in Section 801.02 the crime of rape when committed with a person fourteen years of age or under, and by Section 801.03 made the *maximum* penalty for any crime covered by the Chapter twenty-five years in the state prison. In upholding the conviction, the Florida Supreme Court ruled that insofar as applied to rape and the penalty therefor, the provisions of the Child Molester Law were contrary to the State Constitution, citing three grounds: 1) The Chapter embraced eleven different crimes denounced by other Statutes of the State of Florida; 2) It did not publish at length the Statutes with reference to rape which it attempted to amend; and 3) The title of the act was insufficient to give notice that

one of the purposes of the act was to change the penalty for rape.*

Since the *Copeland* case the Florida Supreme Court has not had occasion to consider directly the validity under the State Constitution of the Child Molester Law as applied to other crimes, though a Florida District Court of Appeal did have occasion to consider the question in *Buchanan* v. *State*, 111 So. 2d 51 (Fla. App., 1959) and upheld the law as applied to the crime of lewd and lascivious conduct. The point of this discussion is not to establish with certainty that counsel for petitioner at his trial could have successfully attacked the constitutionality of the Child Molester Law as applied to petitioner;** the point is rather that there were complex legal problems either implicitly or potentially involved which it is clear that petitioner without aid could not present.

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* Subsequent to the *Copeland* case Section 801.02 was amended to exclude rape from the crimes included thereunder. See Chapter 29923, Laws of Florida, Acts of 1955.

** It appears likely that, notwithstanding the reference by respondent in his return and the opinion of the Court below, it would have developed that insofar as the first count against petitioner (the count charging incest) was concerned, the provisions of the Child Molester Law have no application at all, inasmuch as that law did not include the crime of "incest" within the definition contained in Section 801.02 until amended by the legislature by Section One, Chapter 57-1990, effective December 8, 1957, a date more than one month after petitioner's arrest and almost five months after the alleged criminal act. Accordingly, it seems probable that notwithstanding the opinion below, the "incest" count was based solely on Section 741.22 of the Florida Statutes, while the "fondling" (lewd and lascivious behavior) charge of the second count presumably fell within the language of Section 801.02, "incorporating" Section 800.04 of the Florida Statutes. The relationship between Sections 800.04 and 801.02 is far from clear. The first Section purports to deal with "lewd, lascivious behavior" relating to children under fourteen, while the other includes such behavior relating to children fourteen years of age or under. See also *Mueller, Criminal Law and Administration*, 35 N.Y. Univ. Law Review, 111, 112 (footnote 6).

Counsel for petitioner, had there been such, might also have given advice with respect to the advisability, under the circumstances, of petitioner and his wife testifying in their own behalf; it is certain that counsel could have questioned petitioner and his wife in a manner to elicit facts more germane to the issues involved than were forthcoming in petitioner's own statement set forth above. It is also possible that counsel could have subpoenaed other witnesses, or called other of petitioner's children to testify as to the circumstances involved; it seems certain that counsel could have explored in cross-examination of the State's only two witnesses the possibility of prejudice on the part of those witnesses against their parents arising out of previous difficulties suggested by the testimony.

Counsel clearly could have requested the court to instruct the jury in accordance with the instructions discussed in *Howell* v. *State*, 102 Fla. 612, 136 So. 456, reversed on rehearing on other grounds, 102 Fla. 612, 139 So. 187, where the court upheld charges concerning the ease of charging incest and the difficulty of proving it, and the relationship of the prosecuting witness to the defendant, and feelings which she might have against him. The court in petitioner's trial gave only general charges with respect to credibility of witnesses. It likewise seems clear that counsel would have been much better equipped to cross-examine the State's only two witnesses than were the defendants in the case, the witnesses' own father and mother.

It is unnecessary to dwell further on possible ways counsel might have assisted in defending the charges against petitioner. Suffice it to say, that contrary to the assertion of respondent in its return to petitioner's application for a writ of habeas corpus, numerous legal questions were either potentially or implicitly involved which were clearly beyond the ken of the ordinary layman, and *a fortiori*,

the illiterate layman. This court concluded in *McNeal* v. *Culver*, 365 U.S. 109, that Due Process of Law required that the petitioner there have the assistance of counsel at the trial of his case. In this case as in that one the gravity of the crime, coupled with the complicated nature of the offense charged and the possible defenses thereto, and the education and ability of the defendant, rendered the trial proceedings without counsel so apt to result in injustice as to be fundamentally unfair. In this case, it is clear that the petitioner does not merely lack education, he is illiterate.

III.

Denial of Counsel to an Indigent Defendant While According to Other Defendants an Unqualified Right to Counsel Results in a Denial of Due Process and Equal Protection to Such an Indigent Defendant.

Reference should also be made to the argument advanced by the concurring opinion in *McNeal* v. *Culver*, 365 U.S. 109, which was specifically excluded from consideration in the Court's opinion. In brief, that argument is that since *Chandler* v. *Fretag*, 348 U.S. 3, holding that the right of a defendant in a state criminal trial to be heard through his own counsel is unqualified, it must appropriately follow that the right of a defendant too poor to obtain his own counsel to be heard through court appointed counsel is similarly unqualified. To hold otherwise would be to tolerate a discrimination between rich and poor in the application of the criminal laws of a state, since the destitute defendant would be deprived of his "unqualified" right to counsel solely because of his poverty.

This court recognized in *Griffin* v. *Illinois*, 351 U.S. 12, that in the tradition of Magna Charta, "our own constitutional guaranties of due process and equal protection both

call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court'. *Chambers* v. *Florida*, 309 U.S. 227, 241. See also *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369." 351 U.S. 12, 17. In the present case petitioner alleged in his application for a writ of habeas corpus that he requested defense counsel (R. 2), and in his "Return to Respondent's Reply Brief" that he was "indigent" (R. 70). Thus there can be no question that the right of a state to deny the request of an indigent defendant for counsel was clearly raised and necessarily passed on by the court below. *Reynolds* v. *Cochran*, 365 U.S. 525, clearly reaffirmed the doctrine of *Chandler* v. *Fretag, supra.* In the light of this holding the rule announced in *Betts* v. *Brady*, 316 U.S. 455, can no longer be reconciled with the holding of *Griffin* v. *Illinois, supra*, where the opinion of Mr. Justice Black, joined by three other members of the Court, recognized that: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." 351 U.S. 12, 19.

IV.

There Is No Necessity in View of the Facts Conceded by Respondent and Established by the Record for Remanding This Case for a Hearing on Petitioner's Allegations; Petitioner Is Entitled to Immediate Discharge From Custody.

In view of the uncontradicted fact of petitioner's illiteracy, and in view of the clearly established fact that petitioner was not represented by counsel at this trial, it is contended that there is no necessity in this case for a hearing in the Court below to determine the truth of petitioner's allegations. As in *Hudson* v. *North Carolina*, 363 U.S. 697, and *Gibbs* v. *Burke*, 337 U.S. 773, the record itself demonstrates the denial of Due Process and Equal Protection to petitioner. There is absolutely no suggestion in the record, nor does respondent affirmatively contend in its return to petitioner's application for a writ of habeas corpus, that petitioner competently or intelligently waived counsel.* Although respondent did deny petitioner's allegation that he requested counsel, this Court has never held that a timely request for assistance of counsel by an illiterate defendant,

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* Although it is noted that the Florida Supreme Court opinion makes reference to a "presumption" of waiver of counsel where the record shows the defendant did not have counsel, it is clear that no such "presumption" can prevail as against petitioner's clear allegation that he requested appointment of counsel and was refused. See *Herman* v. *Claudy*, 350 U.S. 116, *Moore* v. *Michigan*, 355 U.S. 155. See also *Johnson* v. *Zerbst*, 304 U.S. 458. If such a "presumption" were allowed no petitioner could raise a Constitutional claim involving deprivation of counsel without the aid of a record which affirmatively established that although counsel did not assist, the right was *not* waived. The record in this case reveals no advice by the trial court to petitioner as to his right to counsel, and no waiver by petitioner of any such right. For a case involving a similar recitation as to waiver in the court below, see *Rice* v. *Olson*, 324 U.S. 786.

ignorant of his rights in this regard, is an essential element in establishing that Due Process has been denied. See *Gibbs* v. *Burke*, 337 U.S. 773. Accordingly, it is respectfully submitted that the uncontroverted allegations alone establish petitioner's entitlement to the writ. Even if the uncontroverted allegations be deemed insufficient, however, it is clear, based on the foregoing discussion of the circumstances of petitioner's trial and conviction, that he was at least entitled to an opportunity for a hearing on the truth of his allegations. *Reynolds* v. *Cochrane*, 365 U.S. 525, *McNeal* v. *Culver*, 365 U.S. 109, *Herman* v. *Claudy*, 350 U.S. 116. The last cited decision makes clear the rule that mere *denial* of an allegation by prosecuting officials without an opportunity for a petitioner to prove his charge at a full hearing does not eliminate the necessity for such a hearing.

Conclusion

There is no question in this case that petitioner "is completely without education and cannot recount the ABC's" (R. 1). It is also clear that he was not represented by counsel in a serious criminal trial which resulted in his conviction and a sentence of up to twenty years in prison. A review of the transcript of testimony at petitioner's trial reveals his complete ignorance with respect to criminal procedure and the legal issues involved in his case, and makes apparent his complete inability to represent himself in the face of these charges. This Court has been zealous in its protection of the rights of the citizen, who, while protesting his innocence, is nonetheless forced to go to trial and defend himself without the aid of counsel against serious charges. In this case the charges are not only serious, they are of the type which are peculiarly repugnant to the average citizen. Under these circumstances it is particularly important that an accused be afforded every

right designed by law to protect the liberties of the citizen. It is submitted that the proceedings against petitioner cannot be squared with the guarantees of the Fourteenth Amendment denying the States the right to deprive any person of his liberty without due process of law, and guaranteeing all persons the equal protection of the laws. The judgment of the Court below must be reversed.

Respectfully submitted,

HAROLD A. WARD, III
WINDERWEEDLE, HAINES, HUNTER & WARD
Attorney for Petitioner

I HEREBY CERTIFY that a copy hereof has been furnished by mail to the Attorney General, State of Florida, attention of the Honorable James G. Mahorner, Assistant Attorney General, Tallahassee, Florida, this 1st day of September, A.D. 1961.

HAROLD A. WARD, III

Appendix

United States Constitution, Amendment XIV, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 801.02, Florida Statutes, 1959:

> "Definitions.—An offense under the provision of this chapter shall include attempted rape, sodomy, attempted sodomy, crimes against nature, attempted crimes against nature, lewd and lascivious behavior, incest and attempted incest, assault (when a sexual act is completed or attempted) and assault and battery (when a sexual act is completed or attempted), when said acts are committed against, to or with a person fourteen years of age or under."

Section 801.03(1)(a) Florida Statutes, 1959:

> "Powers and duties of judge after convictions.—When any person has been convicted of an offense within the meaning of this chapter, it shall be within the power and jurisdiction of the trial judge to:
>
> (a) Sentence said person to a term of years not to exceed twenty-five years in the state prison at Raiford."

Section 801.03(1)(b) Florida Statutes, 1959:

> "Powers and duties of judge after convictions.—When any person has been convicted of an offense within the meaning of this chapter, it shall be within the power and jurisdiction of the trial judge to:

(b) Commit such person for treatment and rehabilitation to the Florida state hospital, or to the hospital or the state institution to which he would be sent as provided by law because of his age or color provided the hospital or institution possesses a maximum security facility as prescribed by the board of commissioners of state institutions. When, as provided for in this law, there shall have been created and established a Florida research and treatment center then the trial judge shall, instead of committing a person to the Florida state hospital, commit such person instead to the Florida research and treatment center. In any such case the court may, in its discretion, stay further criminal proceedings or defer the imposition of sentence pending the discharge of such person from further treatment in accordance with the procedure as outlined in this chapter."

Section 801.08, Florida Statutes, 1959:

"Execution of judgment may be suspended; probation; requirements.—

(1) The trial judge under whose jurisdiction a conviction is obtained may suspend the execution of judgment and place the defendant upon probation.

(2) The trial court placing a defendant on probation may at any time revoke the order placing such defendant on probation and impose such sentence or commitment as might have been imposed at the time of conviction.

(3) No defendant shall be placed on probation or continue on probation until the court is satisfied that the defendant will take regular psychiatric, psychotherapeutic or counseling help, and the individual helping the defendant shall make written reports at intervals of not more than six months to the court and the probation officer in charge of the case. The costs, fees and charges for treatment of defendant on probation shall not be a charge of the county where the defendant was tried."

Section 801.10, Florida Statutes, 1959:

"Examination; petition for, court order.—When any person is charged with an offense within the purview of this chapter, said person may petition the court for a psychiatric and psychological examination as heretofore set out and the written report shall be filed with the clerk of the court having jurisdiction of the offense for the purpose of assisting the court in the trial of the case. The court may, of its own initiative, or upon petition of an interested person, order such examination and report as heretofore set out."

Section 741.22, Florida Statutes, 1959:

"Punishment for incest.—Persons within the degrees of consanguinity within which marriages are prohibited, or declared by law to be incestuous and void, who intermarry or commit adultery or fornication with each other, shall be punished by imprisonment in the state prison not exceeding twenty years, or in the county jail not exceeding one year."

Section 800.04, Florida Statutes, 1959:

"Lewd, lascivious or indecent assault or act upon or in presence of child.—Any person who shall handle, fondle or make an assault upon any male or female child under the age of fourteen years in a lewd, lascivious or indecent manner, or who shall knowingly commit any lewd or lascivious act in the presence of such child, without intent to commit rape where such child is female, shall be deemed guilty of a felony and punished by imprisonment in the state prison or county jail for not more than ten years."